

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Supreme Court of the State of Illinois sought to be reviewed is reported in 373 Ill. 361, 26 N. E. (2d) 504, as case entitled *Adler v. Adler*, and is also reproduced in the record filed herein (R. 222-232).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 937, 28 U. S. C. A. Sec. 344 (b), and in accordance with the statements set forth in the accompanying petition for writ of certiorari under the heading "Jurisdiction" (*Supra*, pp. 4-11) which statement is adopted as the statement on which jurisdiction of this Court is invoked in this brief in support of the petition for certiorari. The date of the final judgment of the Supreme Court of the State of Illinois sought to be reviewed is April 10, 1940 (R. 279).

Statement of the Case.

A full statement of the case is set forth in the accompanying petition for writ of certiorari under the heading "Summary Statement of the Matter Involved" (*Supra*, pp. 1-4), which statement together with the following additional facts, is adopted as the statement of the case in this brief in support of the petition for certiorari.

Sidney Adler was a lawyer of the Chicago Bar who started with a modest income in 1895 and had prospered and grown with the years. In 1922 he had a professional income of \$34,000.00 and other income of \$16,000.00 (Abs.

132) and was worth approximately a half million dollars (Abs. 113). In 1920 the parties owned jointly a home valued at \$50,000.00 (Abs. 138). They separated and Sara Adler conveyed to Sidney Adler her half interest in the home. Adler then created the 1920 trust to pay Sara Adler \$5400.00 for her life, reserving to himself the remainder. Two years passed, the then statutory desertion period, and Adler filed suit for divorce. Negotiations were opened by Adler for a property settlement which he successfully arranged prior to the divorce hearing. Adler so told the court (Abs. 4). The court then entered instanter a decree of divorce against Sara Adler for her desertion, reserving for further consideration the question of alimony.

On December 1, 1922, the following day, the parties signed the Supplemental Trust papers which were presented to the court the following day, December 2, 1922, together with a consent decree signed by Sidney Adler and Sara Adler and also by their respective counsel, which was signed by the judge and entered of record instanter.

After his divorce Adler conveyed the trust property to his sons subject to his life estate.

In 1923 Sidney Adler remarried and on December 31, 1924, conveyed the excess income in the trust property to his second wife during their joint lives and as long as they lived together by a document reciting that he had "deeded a life estate for and during the natural life of Sara Adler, his former wife to * * * trustees with powers and duties among other things of paying \$10,000.00 of the annual income thereof to said Sara Adler, for and during her natural life * * *." This conveyance states that upon the death of Sara Adler her "annuity of \$10,000.00 shall revert" to Sidney Adler (Abs. 95-96).

The supplemental trust is built upon the shoulders of the first trust and appropriates the next \$4,600.00 of the yearly income therefrom. That it was intended to be a full

and final settlement between the parties is loudly spoken and echoed and re-echoed by the record. It settles for all rights including alimony; it pays for all rights including alimony and it releases all rights including alimony (Abst. 27-28) and is a contract, between persons who are no longer occupying the marriage relation, as it states, between "Sidney Adler and Sara Adler formerly husband and wife but now divorced from each other by decree" entered November 29, 1922 (Abst. 17). That the agreements and decree completely settle all alimony and other marital rights of Sara Adler, at least in contractual form is admitted, but it is contended by Sidney Adler that, even so intended, the contracts merged in the decree they having called it by the name of "alimony", they had no power to contract against the statutory jurisdiction of the courts to modify alimony payments as circumstances of the parties might change.

The property agreements confirmed by the decree were contained in two sets of instruments. *First*: On December 30, 1920 (two years prior to the divorce decree) property was conveyed to three trustees in trust thereby creating "a life estate for and during the life of the said Sara Adler" and the trustees "to have and to hold the above described property for the life of said Sara Adler upon the following uses and trusts," etc. This trust provided for quarterly payments to Sara Adler of \$1350.00. This trust was not disturbed by the order of May 8, 1939, for in the petition to modify the decree, that portion was specifically excepted. *Second*: the day following the decree of divorce the parties entered into a further agreement between themselves and the trustees upon the same considerations as the trust arrangement creating the said life estate "for the purpose of making full and final provision for maintenance and support of Sara Adler and for alimony, dower, and rights of dower, and all claims and property rights, and rights of every kind and nature" of Sara Adler against Sidney Adler.

by which agreement the trustees were directed to pay to Sara Adler the further sum of \$1150.00 quarterly during her life which "shall be in full settlement of all her alimony, dower and rights of dower, and all other rights, claims and demands" against Sidney Adler. This second trust provision was voided by the decree of the court by denominating it to be a decree for "alimony", notwithstanding the contracts had released alimony, and stated it to be in full of alimony.

Both sets of agreements contain provisions by which Adler obligates himself to make good any deficiency upon the failure of the trust to produce the payments provided to be paid by trustees.

By its decree the court ratified the documents of December 30, 1920 and those of December 1, 1922 and decreed that

"Sidney Adler shall well and truly promptly make all the payments of money and shall well and truly keep and perform all and every of the covenants and agreements on his part to be performed in and by the terms of said supplemental Trust Indenture and Supplemental Agreement dated December 1, 1922 and that the payments to said Sara Adler as provided in said last two mentioned instruments and the faithful performance of all other provisions thereof for the benefit of said Sara Adler shall constitute and be received by said Sara Adler as and for her permanent alimony and as a complete and final settlement of all her rights of dower alimony, property, and other rights and claims against said Sidney Adler. No subsequent marriage of said Sara Adler shall affect this decree or any or all of the indentures or agreements in this decree referred to."

On December 26, 1922, an agreement was entered between Sidney and Sara Adler, clarifying and amending the supplemental trust agreement of December 1, 1922 (Abs. 35-36, 9). On the same date a trust indenture conveyance was made

showing the changes (Abs. 37-9). This conveyance was recorded in the recorder's office of Cook County, as were all the trust indentures mentioned, but these two clarifying and amending instruments were not entered in a court decree.

Specification of Errors.

Petitioner assigns the following errors which she intends to urge in the event her petition for a writ of certiorari is allowed:

The Supreme Court of the State of Illinois erred in holding that the contract and trust agreements made between the parties and ratified and approved in the consent decree were merged in the decree as alimony and erred in decreeing their cancellation and abrogation.

The Supreme Court of the State of Illinois erred in holding that the provisions of the consent decree ratifying the supplemental trust agreement merged the contracts and the decree and thereby became a provision for alimony payments and erred in refusing to hold that the supplemental trust agreements were in full of and in lieu of alimony and all marital rights and not alimony.

The Supreme Court of the State of Illinois erred in holding that the provisions of the consent decree in a divorce proceeding giving her an interest in a trust for life regardless of her subsequent remarriage was alimony instead of an irrevocable property right or alimony in gross under the laws of Illinois.

The Supreme Court of the State of Illinois erred in holding that a consent decree in a divorce proceeding embodying the terms of a contract wherein the decree specifically states "no subsequent marriage of said Sara Adler shall affect this decree or any or all of the Indentures or Agreements in this decree referred to," can be modified on the ground of remarriage.

The Supreme Court of the State of Illinois erred in holding that a consent decree of divorce ratifying and approving a valid contract between the parties and decreeing that it shall be received by her "as and for her permanent alimony and as a complete and final settlement of all her rights of dower, alimony, property and other rights and claims against said Sidney Adler," may be modified by the court.

The Supreme Court of the State of Illinois erred in applying a statute enacted in 1933 to a decree entered December 2, 1922 whereby alimony was cancelled and abrogated on the basis of the enactment of 1933 and erred in applying it at all.

The court erred in destroying the trust as distinguished from modifying payments due under the personal liability of Sidney Adler in case of deficiency in the trust revenues.

ARGUMENT.

The trust agreements and the decree ratifying them create a vested property interest in the real estate placed in trust and the rents and profits and issues thereof, which the decision of the court destroys.

That the trust agreements and trust indentures, to all of which the trustees are parties, were distinctly property settlements, having none of the characteristics of alimony, is evidenced in many ways in this record as we now show.

To begin with the suit is by the husband, not the wife. It may be conceded as true as stated in the opinion of the Supreme Court of Illinois, that cases can be conceived of where, in equity, an erring wife might, under the Illinois Statute as it then existed, be allowed alimony to keep her from becoming a charge upon society, etc.; but this is not that type of a case. The original trust of December 30, 1920 was then in existence producing \$5,400.00 per year for Mrs. Adler. Adler was a wealthy man. So there was no condi-

tion before the court warranting the exercise of this extraordinary jurisdiction and of course the allowance to Sara Adler did not proceed upon that ground. That thought was in no one's mind.

Then there were no pleadings raising the question of an allowance of alimony, or of a property settlement. No fight was being waged for it. The complaint alleged only the jurisdictional facts and claimed a divorce for desertion. The answer of Sara Adler denied the desertion and asked that the complaint be dismissed. That was the extent of the pleadings (Abs. 1-2).

The suggestion of alimony first appears in the statement of Sidney Adler on the witness stand when he told the trial judge that he had established a trust for his wife's support and maintenance, and then volunteered to do anything fair as to alimony, suggesting that his wife had conveyed to him her interest in their home, that an agreement had been reached, and said that that fact was taken into consideration in the agreement (Abs. 3-4).

It was on those statements that the court, in entering the divorce decree, which he did instantter, reserved the question of alimony for "further consideration."

Two days after the decree of divorce was entered the four documents creating the original trust, and the supplements thereto, were presented to the court with a consent decree, signed by the parties, which was entered and which recites the trust of December 30, 1920, and states that that trust, producing \$5,400.00 yearly, should not be affected by the decree; and then states that the court is advised that an agreement has been reached to pay Sara Adler.

"* * * \$1150.00 quarter yearly for her life making \$2500.00 quarter yearly and that this amount has been secured to said Sara Adler by a certain supplemental trust agreement bearing date the first day of December, A. D. 1922 * * * and that the increased

payments * * * were intended to be and are *in full of all claims* and rights of dower, *alimony*, property and other rights and claims which the said Sara Adler now has or may hereafter have against said Sidney Adler, and that Sara Adler is willing to accept the same *in full of* such claims and rights of dower, *alimony* and property and other rights and claims, excepting always her rights under said indenture, and trust agreement dated December 30, 1920. * * * And * * * the payments provided to be made to Sara Adler are to continue even though the said Sara Adler should hereafter remarry. And * * * upon consent of the parties * * * evidenced by their respective signatures attached hereto:

It is ordered, adjudged and decreed that said supplemental trust indenture and supplemental trust agreement are hereby in all things confirmed * * *."

The decree then provides that Sidney Adler shall make the payments and perform the covenants of those agreements and that

"* * * the payments to said Sara Adler as provided in the last two mentioned instruments and the faithful performance of all other provisions *thereof for the benefit of Sara Adler* shall constitute and be received by said Sara Adler as and for her *permanent alimony and as a complete and final settlement of all her rights* of dower, *alimony*, property, and other rights and claims against Sidney Adler. No subsequent marriage of said Sara Adler shall affect this decree or any or all of the indentures or agreements in this decree referred to

"Enter: GEORGE FRED RUSH.

"We consent to the entry of the above and foregoing decree.

"SIDNEY ADLER.

"SARA ADLER."

The provisions of this decree are as well the representations and stipulations of fact forming their contract settlement in full as they are the decree of the court. The judicial mind did not have to be exercised.

Thus it is seen that this is purely a settlement in full by Sara Adler of all claims, including alimony; "as a complete and final settlement of all her rights of dower, alimony," etc. It was a settlement in full and a satisfaction of record of any personal obligation of support or maintenance owed then or ever owed by Sidney Adler. It was arranged for prior to the divorce when contests might have been judicially waged and then taken to the court after the divorce decree had been entered. It was clearly intended to shift any personal obligation to support from Sidney Adler upon the trust property.

It is to be noted that the decree does not purport to order Sidney Adler to personally make the payments provided for in the trusts; the trustees were to do that; the only requirement was that Sidney Adler should make the payments provided for in the agreements for him to make and those were to make up any deficiency in the quarterly installments that might occur; which is purely a secondary obligation. The relationship created is that of guarantor which is a contractual obligation and has none of the characteristics of alimony.

Then it is to be noted that the conveyance in trust to the trustees made by Sidney Adler and joined in by Sara Adler recites that

"they do hereby convey and quit-claim unto * * * as grantees, a life estate for and during the lifetime of said Sara Adler * * * to have and to hold the above described property for the life of Sara Adler upon the following uses and trusts, to-wit" (Abs. 13).

Then follows the contractual rights of the parties and active duties of the trustees.

The payments to be made under the supplemental or second trust arrangement are simply added on to the first trust as additional payments of \$1150.00 per quarter for the life of Sara Adler. So it remains a life estate with the extent only of her interest increased.

It is to be further noted that the second trust agreement is prefaced with a statement of the new relationship of the parties who were "formerly husband and wife, but now divorced from each other by decree entered * * * on November 29, 1922" (Abs. 17) from which it is clear Sidney Adler was not contracting to take on alimony payments for life; it is equally clear he was seeking to quiet that matter and to be forever discharged of that obligation. In fact, the supplemental trust indenture adding the \$1150.00 payments to the charge upon the trust property in addition to the \$1350.00 payments specifically says it is in

"consideration of the relinquishment of alimony, dower and all other claims and demands to which said Sara Adler is now or might hereafter become entitled;
* * * the trustees shall pay * * *'" (Abs. 19).

Obviously a decree ratifying the relinquishment of alimony is not the awarding of alimony.

Again in the supplemental trust agreement it is recited as a consideration that Sara Adler had conveyed to Sidney Adler 5710 Woodlawn Avenue, Chicago and "did give and yield other good and valuable considerations" for the trust agreements of December 30, 1920 and had thereby expressly retained other claims; and that agreement then states

"for the purpose of making full and final provision for the maintenance and support of said Sara Adler and for alimony dower and rights of dower, and all claims and property rights, and rights of every kind and nature of second party against first party; * * * and second party (Sara Adler) does hereby forever release and discharge first party (Sidney Adler) from all claims and

demands which she may have against him except such as are secured to her by the terms of said trust indentures of December 30, 1920, said supplemental Trust Indentures of even date herewith and this supplemental agreement" (Abs. 24-28).

From this it is seen the claim of alimony was released with other claims and all such claims are merged in the trust and disappear as such. Nothing was left for the court to pass upon except the agreement which satisfied all claims including alimony; so instead of decreeing alimony, the court satisfied all claims of alimony with other claims.

Obviously if Sara Adler released her rights to alimony the court did not decree any to her but only decree to her the price for the release of alimony.

Again we find a provision that the trustees are to make the payments

"direct to Sara Adler and not upon any assignment written or oral and the same shall not be subject to garnishment or any other proceeding on the part of any creditor" (Abs. 20).

which has the earmarks of a spendthrift trust and fits the provisions of Section 49 of Chapter 22, Illinois Revised Statutes which provides that creditors may not reach a trust fund "when such trust has in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself."

This provision definitely stamps the payments as trust payments and not alimony payments and confesses the trust nature of the payments.

Also there is the provision for a lien upon the trust property to secure the payments and the right to foreclose that lien; and the provision for a suit at law upon default of payments by the trustees. These are not the characteristics of alimony. They are agreements and stipulations carrying

the rights of Sara Adler into the contractual field and beyond the realm of alimony.

And so it is that the court has permitted Sidney Adler to renege his contract obligations and to now claim that he owes alimony as against his industrious effort to satisfy and discharge that obligation by charging it upon property by deed and contract and having it satisfied of record, because perchance it might be more advantageous to him to reclaim the excess income of the trust over \$5,400.00 as his own.

The decision of the trial court and of the Supreme Court clearly destroy the obligations of the contract between the parties solemnly decreed of record and invades and destroys the constitutional rights of Sara Adler.

II.

The obligation to pay alimony is not a debt but a duty of the husband to support his wife. Where by consent of the parties the obligation is enlarged beyond the divorce statute to extend payments for the life of the wife and by its terms become a charge upon his estate, the decree rests upon contract and is not alimony subject to modification.

The decree here did not create that type of alimony which may be modified from time to time;—that obligation, raised by the relationship of husband and wife, charged personally upon the shoulders of the divorced husband which is the equivalent of support and maintenance; an obligation which is not a debt and which will be enforced by the *in personam* processes of equity. That type of alimony which may be modified from time to time is one that is a continuing obligation existing for the *joint lives* of the parties; when it overflows into the husband's estate it cannot be the subject of modification. The Illinois decisions define alimony to be the provision dictated by the duty of the husband to support his wife so long as they both shall live, or during their

joint lives, as it is expressed (*Stillman v. Stillman*, 99 Ill. 196; *Smith v. Smith*, 334 Ill. 370, 380; *Herrick v. Herrick*, 319 Ill. 146). The type of alimony here created if it is to be denominated alimony is a specific charge and lien upon property and its income to continue for the life of Sara Adler, notwithstanding Sidney Adler might have deceased. That is not alimony that rests upon Sidney Adler's shoulders. For he had shouldered it upon a piece of property dedicated to raising the necessary money during the life of Sara Adler, when he may have deceased. That provision flows from his contract,—not his duty.

The provisions made in this decree are not provisions for alimony because alimony is allowed to the wife in recognition of the husband's duty to support his wife during the joint lives of the two. (Bishop, *Marriage and Divorce* (6th Ed.) 8 Sec. 42 F; *Lennahan v. O'Keefe*, 107 Ill. 626; *Stillman v. Stillman*, 99 Ill. 196; *Smith v. Smith*, 334 Ill. 370, 380). Liability for support of the wife necessarily ends with the death of the husband. Alimony, therefore, is ended by the death of the husband, an event upon which the obligation to support would have ended had there been no divorce. (*Brandon v. Brandon*, 1940 Tenn., 135 S. W. (2nd) 929.)

In this case the wife was to receive the income from the property for her natural life, enforceable after his death as against the property in the trust conveyance, both by the terms of the contract and trust, and the court decree of 1922 (Abs. 5-8). Subsequent marriage on her part was not to affect the decree or the contract or the conveyance as the court itself so ordered (Abs. 8). These are not proper alimony provisions except by the contract and consent of the parties, for "he was under no obligation to make provision for her support and maintenance after her death, if she survived him." *Smith v. Smith*, 334 Ill. 370, 380.

A well established test to determine whether a decree is an alimony decree, and therefore subject to modification

by the court in which the decree was entered, is whether the provisions embodied in the decree could have been imposed by the court without the consent and agreement of the parties (*North v. North*, 339 Mo. 1126, 100 S. W. (2d) 582; *Dickey v. Dickey*, 154 Md. 675, 151 Atl. 387; *Spear v. Spear*, 158 Md. 672, 149 Atl. 468; *Moore v. Crutchfield*, 136 Va. 20, 116 S. E. 482).

North v. North, *supra*, the court said:

“The provisions in the decree awarding the wife \$500.00 per month to continue so long as she remained single and unmarried justifies the conclusion that the decree was an approval of the contract and not an award of alimony, because the court had no authority to make an award of alimony to continue so long as the wife remained single and unmarried, but did have authority to approve the contract between the parties containing that provision.”

“The statute which authorizes the court to modify an award of alimony does not authorize the modification of legal contractual obligations which the husband assumes and agrees to pay his wife. So the question in this case is whether or not the \$500.00 monthly allowance to the wife is an award of alimony. If it is alimony it is subject to modification; on the other hand, if it is not alimony, but is a legal contractual obligation of the husband, then contract is not subject to modification by the court. A proper determination of that question will settle this case.

“The marital duty of a husband to support his wife is upon him only during his lifetime, therefore, the court cannot compel him to make provision for its continuance after his death. However, a husband may voluntarily, by contract, make provision for support to continue after his death if he sees fit to do so, and the court is authorized to approve such an agreement. The court could not have made the award but for the contract between the parties. Therefore, the decree was an approval of the contractual obligation of the husband to the wife and not an award of alimony in

the sense in which the word alimony is used in the statute."

Barnes v. Am. Fertilizer Co., 1935, 144 Va. 692, 103 S. E. 903, 907.

"It cannot be questioned, however, that although the courts may have no authority in the absence of statute to allot to the wife any part of the husband's real estate as alimony, courts which have jurisdiction to grant divorces and award alimony also have the incidental authority to approve bona fide and valid agreements between the parties for the settlement of property rights and claims for alimony, though they have no jurisdiction in the divorce suit to enforce compliance with such contracts, or to alter their terms. This seems to be the general rule and has been so held in several cases in this State.

"And engrafted upon the rule above referred to is the further doctrine that a decree entered in a divorce suit approving a contract between the parties for the settlement of alimony and property rights is not a decree for alimony."

In *Dickey v. Dickey*, 154 Md. 675, the court said that there is no ground for the assumption that the parties who were acting under advice of their counsel, did not know that the continuation of the husband's obligation to pay after his death was an extension of his duty to pay alimony, which ceases at the death of the husband and so this enlargement in point of time of the husband's obligation to pay alimony was doubtlessly reflected in the amount of the agreed weekly payments. If the allowance to the wife in the decree is the result of a previous agreement between the spouses and does not fall within the accepted definition of alimony, so that it would have been impossible for the chancellor to have allowed permanent alimony as the decree provides, then notwithstanding the parties and even the court called it alimony, the allowance in the decree for the

wife was not alimony and a court of equity has no power to modify the decree as in the case of an award of alimony. The agreement by the husband to pay the wife a weekly sum of money until her death did not limit his payments to the joint lives of the spouses and hence was not what the court could have decreed as alimony, but this agreement provided the wife with a weekly stipend without reference to whether the husband survived her or not, was properly incorporated in the decree.

In *Storey v. Storey*, 125 Ill. 608, 18 N. E. 309, the husband agreed to pay the wife a sum of \$2,000.00 a year for as long as she may be and remain sole and unmarried and this was provided to be binding on his heirs, assigns, etc. It was held in this case that alimony by agreement could extend beyond the husband's life. However, in *Adams v. Storey*, 135 Ill. 448, 26 N. E. 682, where the wife above sought dower in her former husband's property, it was held that the alimony paid above for as long as she should live cut off dower rights, because the "allowance made (in *Storey v. Storey*) not only furnished her with alimony proper, but with a full and liberal equivalent for dower." The court said that since there was no duty on his part "it must be presumed under the circumstances of the case, that the allowance of \$2,000.00 a year for the time intervening the death of her husband and her own death, was in lieu of dower."

Further the decree in this case was not a personal decree, at least, in so far as the trust itself is concerned. The power of the court to refuse enforcement of the personal obligations of a decree as was done in *Herrick v. Herrick*, 319 Ill. 146, 149 N. E. 820, where there was a contractual settlement, or the right of the Federal Government to levy a tax on the income of the husband to that extent and for that reason, as in (*Helvering v. Fuller*, 1940, 60 Sup. Ct.

784; *Helvering v. Leonard*, 1940, 60 Sup. Ct. 780; *Helvering v. Fitch*, 1940, 60 Sup. Ct. 427) is not questioned. The court is however, without power to make a new contract and a new conveyance for the parties (*Renick v. Renick*, 1933, 247 Ky. 628, 57 S. W. (2d) 663) and go outside the decree itself containing no personal obligation and order the trustees of a trust to pay over the rents and profits to a person other than the beneficiary named therein. The fact that the court approved the agreement of the parties does not make the order of the court a decree for alimony. (*Moore v. Crutchfield*, 136 Va. 20, 116 S. E. 482; *Stoutenburg v. Stoutenburg*, 285 Mich. 505, 281 N. W. 305). Incorporating the agreement in the decree was made for the obvious purpose of preventing either party from disputing the legality of the agreement. All remedies for the breach of the contract and trust were specifically retained by the terms of the agreement. (Abs. 20-22.)

It was not the intent of the parties that the contract and trust conveyance be merged into a decree for alimony as such. Otherwise it would have been a useless gesture to provide that the payments should run for her life; that the property in trust should be bound after his death; that neither the decree nor the contracts nor the trusts would be affected by her subsequent marriage; that it was a full and final settlement of all right. Furthermore, he treated the trust conveyance as such, as shown by his statements of income, which did not include the trust property (Abs. 15-130).

III.

The retrospective application of the 1933 Statute made by the court, ending the payments held to be alimony because of the remarriage of Sara Adler operates to cut off her vested rights to such alimony, if such payments be alimony.

Assuming for argument's sake that the Supreme Court was right in denominating the trust payments to be "alimony", we make these suggestions to demonstrate that the court has destroyed vested rights by the use of such holding.

There are two provisions of the Illinois Divorée Act pertaining to alimony (Sec. 18, Chap. 40, Ill. Rev. Stat.); it will be useful to differentiate them. The older provision of the law (1874) is:

"The court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance * * * as shall appear reasonable and proper."

Under this act remarriage of a divorced wife has been held by Illinois courts to be no more than such a change in circumstances of the parties as might justify a reduction of alimony.

The amendment of 1933 provided that

"A party shall not be entitled to alimony and maintenance after remarriage."

The Illinois Supreme Court has now held that this operates on all decrees for alimony in existence when the act became effective in 1933 as well as those entered thereafter.

We point out that there is a wide difference between the power reserved in the divorce court to "make *alteration* in the allowance of alimony" and the prohibition in the 1933

amendment which denies the *right* to any alimony after remarriage.

The Illinois Supreme Court has here given a retrospective application to the Act of 1933 by first holding that the settlement trusts, when ratified by decree of 1922, became merged in the decree and by such merger became a provision for alimony; and then further holding that the Act of 1933 ending alimony upon remarriage, operated to cut off the right to such alimony payments under the decree; thus holding that a right to alimony which was vested by the decree in 1922 had been cut off by the legislative Act of 1933. Prospective payments under alimony decrees are vested rights; those payments may be modified, increased or decreased; but to destroy the *right* to such payments is necessarily the destruction of a vested right.

The Supreme Court of Illinois had this point clearly before it, as it says, in its opinion:

“The questioned provision of the amendment to Section 18 of the divorce act is the proviso ‘that a party shall not be entitled to alimony and maintenance after remarriage.’ It is urged that if this clause is given effect, and respondent’s rights to alimony taken away by reason of her remarriage, it takes her vested rights contrary to the constitutional guaranties” (R. 231).

The court then disposed of the contention by holding that the trial court did not, in fact, apply the act retrospectively because it made the modification effective as of the date of filing the petition and then held “The amendment of 1933 to Section 18 of the Divorce Act does not affect any vested rights of respondent.” But the test stated by the court really does not test the question presented, for while the trial court and the Illinois Supreme Court did not cut off the payments as of the day the act became effective, both courts applied the law to a decree some ten years old at the

time of the passage of the Act, by destroying the *rights* to alimony provided for in that decree.

The power possessed by the Illinois courts at the time the decree was entered in 1922 over alimony payments upon remarriage of a divorced wife, was only to *modify* the provisions as to alimony,—not to destroy the rights thereto decreed; to make “alterations in the allowance of alimony,” not to change the right thereto established by the decree.

It is therefore, respectfully suggested that if it be conceded as held by the Supreme Court of Illinois that the decretal provisions were alimony payments, and not a property settlement, and the opinion of the Supreme Court of Illinois is to stand as rendered upon that point, its decision operates to prevent Sara Adler from hereafter applying for an increased allowance upon and adverse change in her fortunes, or a fortuitous change in those of Sidney Adler under the other provision of the statute; for by the decision of the Illinois Supreme Court the supplemental trust is abrogated, annulled, destroyed and wholly lost to Sara Adler, and this notwithstanding the considerations and agreements of the parties upon which those trusts are based. But it is urged that that power the court did not have over decrees antedating the Act of 1933.

This very possibility of remarriage was visioned by the parties and was specified in the trusts and in the decree to be permissible and no cause for abating the payments to be made by the trustees under the trusts. The effect of that agreement was that remarriage should not automatically abate the payments provided in the trust, nor be considered as a cause for abating the payments.

It was not then, in 1922, and it is not now, unlawful nor against public policy in Illinois for a divorced husband to pay alimony to his divorced wife after her remarriage. The decisions have been, in Illinois, prior to this Act of 1933, that remarriage of a divorced wife did not *ipso facto* stop

alimony although it was always recognized as a cause for *modification* of alimony payments upon application of the husband; so that it is obvious that the Act of 1933 only could become an actual part of decrees thereafter entered and could automatically become a part of decrees then in existence.

Moreover, in no case involving modification of alimony payments in remarriage cases has the Illinois courts ever dealt retrospectively with the payments when making modifications on that ground. In the case of *Stillman v. Stillman*, 99 Ill. 196, the divorce court not only refused to abate the payments as of the date of the remarriage, but modified, reduced and continued the payments at \$1.00 per year thereafter; and that order was affirmed.

The opinion of the Supreme Court of Illinois in this case cites the *Stillman v. Stillman* case as authoritative and states the former rule as to the affect upon alimony by remarriage to be

“That remarriage of a woman who was receiving alimony from her former husband was such a change of condition as to authorize a modification of the decree to the extent of cancelling the alimony payments, *Stillman v. Stillman*, 99 Ill. 196; *McGinnis v. McGinnis*, 323 Ill. 113). The amendment merely adopted the general rule and made it mandatory upon the court to cancel alimony payments in all cases where the recipient had remarried.”

But it is seen that the court erred in its conclusion that the amendment “made it mandatory upon the court to cancel alimony payments in all cases where the recipient had remarried,” and further erred in holding that

“Either the remarriage of the respondent or the material impairment of the estate and income of petitioner required a cancellation of all payments of alimony maturing after the filing of the petition” (R. 232).

These holdings are definite decisions that the Act of 1933 is operative upon all such type of alimony decrees then existing.

Thus, as this case now stands, it is *res adjudicata* and *conclusive* between the parties that all payments under the decree of 1922 and the trust upon which that decree rests are abrogated; and the rights of Sara Adler under the decree of December 2, 1922, and the trust agreement of December 1, 1922, are forever cut off by that decision in violation of her constitutional right securing her vested interests.

The net result of the decision of the Supreme Court of Illinois is that the contracts and the decree in question merely set up a system by which alimony payments were to be made; and if that holding is permitted to stand, then that decision will operate to cut off the vested alimony rights of Sara Adler, and all others holding like decrees, and be obnoxious to the constitutional prohibitions specified.

The right reserved to change alimony payments as fortunes change, as that power existed in 1922, is a right reserved to courts to change, *to modify*,—not to destroy. The right given to the courts by the Act of 1933 is to end, *destroy*, terminate. One act is based upon the continuing right to alimony while the other withdraws that right.

It is obvious that both provisions of the statute cannot apply here,—one to *modify* the payments, and the other to cut off the *right* to such payments.

It is not impossible, nor even improbable that upon an upswing of business and values Sidney Adler's fortunes may reach the peak of his former prosperity; nor that the future may bring days of adversity to Sara Adler; and so if the decision stands that the decree awarded alimony rather than having ratified a contract, it nevertheless violates constitutional rights. Whether that right is denominated, decretal or contractual it is violated.

The retroactive application of the Act of 1933 to the decree of 1922 thus destroys a vested right and gives this court the jurisdiction to grant the writ of certiorari, to correct the error.

Respectfully submitted,

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